Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DAVID C. ELLIS,

Petitioner

v.

DEPARTMENT OF THE ARMY

Respondent

On Petitioner For Writ Of Certiorari To
The United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This action originated as an appeal to the Merit Systems Protection Board from the termination of Ellis from his Civil Service position at Fort Knox. Jurisdiction of the Merit Systems Protection Board ("MSPB") is pursuant to 5 U.S.C.A. § 7512 and 5 CFR part 432. A bench initial decision was rendered in the case by the Administrative Law Judge on September 30, 1999. (APP. Page # 5) An appeal was taken to the Court of Appeals for the Federal Circuit from a final decision by the MSPB entered on April 18, 2000 and received by Ellis on April 20, 2000. (APP. Page # 2) The Court of Appeals, Per Curiam, affirmed the MSPB's order on June 6, 2001. This Writ of Certiorari follows.

The questions presented are:

Based upon the evidence, was there error in affirming the MSPB and the Administrative Judge's Bench Initial Decision?

Was there error in the interpretation of 5 C.F.R. 1201.56(c)(3)(1997) in denying Ellis' the right to present his affirmative defense of harmful procedural error?

Was there error in the application of 5 U.S.C. § 2302(b(8), (Whistle-blowing) to the evidence presented?

PARTIES TO THE PROCEEDINGS

Petitioner: David C. Ellis

Respondent: Department of the Army

CORPORATE DISCLOSURE STATEMENT

The Petitioner is an individual. There are no corporations or publicly held companies that own 10 percent or more of the stock represented by in this case.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS

Judgment – United States Court of Appeals for
The Federal Circuit
Case No. 00-3348
David C. Ellis
v.
Department of the Army

Final Order- Merit System Protection Board
Case No. CH 1221990231-W-1
David C. Ellis
v.
Department of the Army

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed was June 6, 2001. No rehearing was granted or extension sought. The statutory provision believed to confer jurisdiction to review of a writ of certiorari 5 U.S.C. § 7703

STATUTES AND REGULATIONS GOVERNING

5 U.S.C.A. § 1221
5 U.S.C.A. § 2302
5 C.F.R. 1201.56

See Appendix for text

STATEMENT OF THE CASE

A. Nature Of The Case

David C. Ellis, ("Ellis") a long time civil service employee of the United States Army, ("Agency") appealed his termination from employment by the Agency, to the Merit Systems Protection Board. ("Board") The stated grounds for Ellis' termination and removal on December 30, 1998 were: 1) unauthorized entry into a government office; 2) possession of an unauthorized key; 3) misuse of government property in violation of 5 CFR § 2635.704 and joint ethics regulation (DOD 5500.77) 2.301; 4) conviction for entering Fort Knox Military reservation in violation of 18 USC 1382 for a purpose prohibited by law or lawful regulation (18 USC 641); and 5) failure to follow supervisor's instructions.

B. Course of Proceedings and Disposition Below

As a result of his termination, Ellis filed an appeal with the Board which was docketed on January 26, 1999. Ellis' requested a stay which was denied by Administrative Law Judge Nina Puglia on February 5, 1999. Ellis then filed a motion for certification of interlocutory appeal on the stay issue on February 22, 1999. That motion was denied on March 5, 1999.

In his appeal to the Board, Ellis alleged three affirmative defenses: retaliation for whistleblowing, reprisal for engaging in EEO activity and harmful procedural error. Pursuant to an order by Judge Puglia issued on February 16, 1999, Ellis submitted a brief outlining support for the three affirmative defenses. On an April 19, 1999, prehearing conference the affirmative defenses were discussed. The affirmative defense of harmful procedural error was summarily stricken by Judge Puglia without explanation in a written order on April 23, 1999. A hearing on the case was started on August 4, 5, and 6,

1999, in Louisville, Kentucky in front of Judge Puglia and, due to the length of testimony, was continued to August 25, 26 and 27. On the latter dates, the hearing was held by video conferencing, with the parties and witnesses at Fort Knox, Kentucky, and Judge Puglia at her office in Chicago, Illinois. At the conclusion of the hearings, Judge Puglia entered a bench decision substantiating the Agency's termination of Ellis. This decision was subsequently reduced to writing as Judge Puglia's Bench Initial Decision. (APP. Page # 5)

Pursuant to 5 U.S.C. 7512 and 5 CFR 432, Ellis then filed a timely Petition for Review of the Initial Bench Decision on November 8, 1999. The Final Order denying the Petition for Review was issued by the Board on April 18, 2000. (APP. Page # 2)

Ellis filed an appeal to that Final Order on June 16, 2000 in the U.S. Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. § 7703. On June 6, 2001, the Court of Appeals affirmed the Board in a per curiam opinion. This Writ follows.

ARGUMENT

FACTS

Ellis was a career civil service employee with the U.S. Army, with twenty five (25) years of service, beginning on October 10 , 1974 and ending on December 30, 1999, the date of his removal. His last duty station was Fort Knox, Kentucky. From 1993, when he arrived at Fort Knox, Ellis was employed as a telecommunications specialist. His job entailed working with and installing telephone equipment, monitoring telephone usage at certain locations at Fort Knox, working with communication vendors and upgrading telephone systems. At all time relevant to this appeal, Ellis' first line supervisor was Barbara Wolfe, ("Wolfe") his second line supervisor was Steven White ("White") and the last supervisor in his immediate chain of command was Roger Balaban ("Balaban") The building in which Ellis worked during

times relevant to this Appeal was Building 1307, 3rd Ave. Fort Knox, Kentucky.

In May, 1994, when Ellis unit moved into Building 1307, he was assigned a cubicle in room 1024 and then in March of 1998 was moved to a cubicle in room 1081. In December 1997, Ellis turned in his key to room 1024, due to his duties being changed. In January 1998, as a result of an EEO complaint filed by Ellis against Wolfe, Ellis' hours were changed so that he once again needed a key to room 1024. Ellis states Wolfe personally provided Ellis a key to 1024 in January 1998. He does not know how the key came into the possession of Wolfe.

Around October 1997, Ellis, along with others who supplied him information, authored and submitted to the Chief of Staff, Colonel Teeters, a whistleblowing document known as a TWISI. (The Way I See It) As a result of Ellis' submission of that document, an investigation was conducted. Judge Puglia found this document to be a protected disclosure and a contributing factor in the removal of Ellis. Balaban, the deciding official involved in Ellis' termination, suspected Ellis was the author of the TWISI from the time the TWISI was made known to him. Although White denies ever specifically suspecting Ellis, or talking with Balaban about Ellis being the author of the TWISI, White believed it to be someone in Ellis' unit. Wolfe remembered talking to White in December 1997 about Ellis being the author of the TWISI.

On July 15, 1998, around 6:00 a.m., Ellis was at work in Building 1307 prior to his regular start time of 6:30 a.m., and was taking boxes from his office to the basement. While walking by room 1024, Ellis thought he saw what appeared to be some sort of rodent tail protruding from one of two doors leading into room 1024. Ellis entered the room through the unlocked door in order to determine what he saw, but, seeing nothing, he turned to leave through the other door. On his way out, he saw another employee,

Michael Moore, in the office walking toward his cubicle.[1] The following day, July 16, 1999, at approximately the same time in the morning, Ellis went back into room 1024 in an effort to locate the rodent. While in the office he made a personal telephone call. While making the telephone call, Wolfe came into the office and motioned Ellis to follow her back to her office. While he did not find the mouse, he did find rodent droppings which he collected and offered to show Wolfe later that day when she interviewed him about his presence in room 1024.

Unknown to Ellis, Moore saw him in room 1024 on July 15, 2000 and reported his observation to White, who then contacted Wolfe after hours on July 15, 1998 and told her about the incident. At White's direction, Wolfe went to the office early the next day to see if Ellis would enter the room again. As stated, she saw Ellis July 16, 1998 and escorted him back to his cubicle. Ellis told her he entered room 1024 with a key and, when she requested the key, he gave it to her.

As a result of this incident, White decided to conduct an investigation as to why Ellis was in 1024 and why he had a key which White had determined was not an official key. White decided his investigation had to look into "other areas to try and determine what may have been happening." This eventually included entering Ellis' e-mail account without Ellis' permission, downloading or printing some of Ellis' e-mails and downloading elements of Ellis' computer hard drive. As a result of White reading Ellis' e-mail, White expanded his investigation and began looking at telephone records for the previous year. On August 5, 1998, White went to the Army's Criminal Investigation Division ("CID") and reported information to them resulting the CID believing Ellis was involved in a

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[1] Room 1024 is a large office space used by many people, containing six separate offices and a number of cubicles. For a complete understanding of the entire floor of building 1307 which contained rooms 1024 and 1018.

multitude of offenses including illegal possession of pornography, illegal transfer of pornography via computer, interception of oral communications, official misconduct in the first degree, production or publication of pornography, solicitation to commit an offense, theft and unlawful entry into a military reservation.

The CID investigation substantiated that Ellis made unofficial telephone calls and, as a result of those telephone calls, Ellis was eventually charged with entering a military reservation for a purpose prohibited by law or lawful regulation, 18 U.S.C. Section 1382. On October 29, 1998, Ellis plead guilty to that one count, resulting in a fine of $100.00 and an order of restitution in the amount of $30.00. On October 30, 1998, Ellis was issued a Notification of Proposed Removal from White. On December 16, 1998, a memorandum from Balaban notified Ellis of his removal effective December 30, 1998.

I. IT WAS ERROR FOR THE APPELLATE COURT TO AFFIRM WITHOUT COMMENT, THE DECISION OF THE BOARD AND THE ADMINISTRATIVE LAW JUDGE, THAT ELLIS HAS NOT MET HIS BURDEN OF PROVING HIS AFFIRMATIVE DEFENSE OF REPRISAL FOR WHISTLE BLOWING.

Ellis cited as an affirmative defense to the Agency action, retaliation under the Whistleblower Protection Act of 1989. Under the act, it is a violation of 5 U.S.C. 2302(b)(8) to take, or fail to take, or to threaten to take, or fail to take, a personnel action with respect to any employee or applicant because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: 1) a violation of law, 2) gross mismanagement, 3) a gross waste of funds, 4) an abuse of authority, or 5) a substantial or specific danger to public health or safety. The elements of

necessary to establish a violation are: 1) a protected disclosure of information was made, 2) the accused officials had knowledge of the disclosure and the identity of the employee making the disclosure, and 3) the protected disclosure was a contributing factor in the personnel action. *Gergick v. General Services Administration*, 43 M.S.P.R. 651, 658-662 (1990) If an employee meets his burden on the above issues, then the burden falls upon the agency to demonstrate by clear and convincing evidence that it would have taken the **same** personnel action absent the protected disclosure. 5 U.S.C.A. § 2302(e)(2); *Martin v. Department of the Air Force*, 73 M.S.P.R. 574, 580 (1997), citing *Connelly v. Nuclear Regulatory Commission*, 64 M.S.P.R. 28, 31 (1994)

The Administrative Judge found Ellis made a protected disclosure and that it was a contributing factor in his removal. [APP. Page #21-23] The Agency then had to prove by clear and convincing evidence it would have taken the same action absent Ellis' disclosure. The Administrative Judge found the Agency met its burden of showing by clear and convincing evidence that its reasons were not retaliatory. She concluded Ellis had not met his burden of proving retaliation for whistleblowing. Ellis believes that decision was unsupported by substantial evidence, was arbitrary and capricious, based upon an incorrect interpretation of the facts, a failure to consider all facts, and an incorrect application of the law. Since the Appellate Court did not comment at all on the issue, it is impossible to understand their rationale in affirming the Agency on this issue.

There were numerous examples in the record which support Ellis' affirmative defense of retaliation for whistle blowing. An example stated in the Facts is illustrative. White's allegations made to the CID were that of Illegal Possession of Pornography, Illegal Transport of Pornography via Computer, Interception of Oral Communications, Official Misconduct in the First Degree, Production or Publication of Pornography,

Solicitation to Commit and Offense, Theft, and Unlawful Entry onto a Military Reservation. The only criminal charge placed against Ellis was the latter one; there was absolutely no factual foundation for the other allegations. The CID report specifically states White was the individual who brought the allegations. White attempts to blame the inclusion of the other allegations on Government attorney Weise, but, Weise denied going to CID and making any such allegations to the CID.

White's propensity to go to extreme measures to retaliate against Ellis was manifested in many other ways. His testimony concerning when he downloaded e-mail and what he downloaded is replete with contradiction between his deposition testimony and his hearing testimony. In the hearing he adamantly testified downloading e-mail in July that was not created until August. Also in regard to the downloading issue, White initially testified that he did all the downloading himself, but later, during cross examination, he reluctantly admitted help from Summitec employees working under his command. That Summitec employees were heavily involved and were working on a "secret" mission for White had to be established through testimony of Sgt. Rodgers, not White. Summitec was the civilian agency that was being specifically attacked by Ellis' TWISI disclosure. For White to use employees who were under his command is extremely telling of White's intentions and desire to go to extraordinary measures to eliminate Ellis. For White to attempt to hide that fact in his sworn testimony is also telling.

It is extremely important to remember White was Ellis' supervisor when Ellis made the protected disclosure. Regardless of whether there was any direct action taken against White as a result of the disclosure, the fact that it came from Ellis and reflected poorly on his command is an issue.

There was extremely strong evidence that White was out to get Ellis for the disclosure, but the

Administrative Judge erroneously discounted that evidence. [APP. Page # 21-25] That evidence was a document created by Wolfe and sent to White wherein she refers to the disclosure and states: "On occasion you have mentioned members of my staff that you 'feel' are responsible for the ongoing investigation. Your reorganization appears to be an attempt to eliminate my position and possibly those of these people." [APP. Page # 21-25) Wolfe states this statement meant White was attempting to remove those people involved in the disclosure. As Balaban stated, Ellis was suspected of making the disclosures.

White continued his manipulation of the facts to Ellis' detriment even during the hearing. White testified he calculated the amount the Government lost by Ellis' actions and calculated it to be $605.00. Upon cross examination he hesitantly admitted that figure included time when Ellis was not working for the Government. He admitted the figure was not correct and was, in fact, inflated. This testimony surprised even the Judge. The figures were absolutely incorrect and reflected a calculated attempt by White to make the situation look worse for Ellis than it actually was. This is particularly evident since the reimbursement was only $30.00. Again, White displayed his desire to go beyond reason, and what was normal, to harm Ellis as much as possible. These too, were facts not considered by the Administrative Judge. Had she considered these facts, she could not have concluded the Agency established by clear and convincing evidence that the action taken was the same as it would have been absent the disclosure.

When a defense of retaliation is asserted, the burden is upon the Agency to prove by clear and convincing evidence they would have taken the same action absent the disclosure by Ellis. *McDaid v. Department of Housing and Urban Development*, 46, MSPR 416, 420 (1990). That burden is a high standard for the Agency. *Rouse v. Farmers State Bank of Jewell*, N.D. Iowa 1994, 866 F.Supp. 1191 The

Administrative Judge stated the "appellant has not presented evidence to contradict Mr. White's testimony about legitimate, non-retaliatory reasons he had to request investigation of the appellant's computer and telephone use or propose the appellant's removal." [APP. Page # 24] There was no evidence showing the Agency would have taken the same action absent the disclosure. Absent such evidence, requiring Ellis to show proof he was treated differently inappropriately and incorrectly shifted the burden to Ellis.

When considering the evidence as a whole, there is no question the Agency's burden has not been met. The evidence showed White to be vindictive towards Ellis and unashamed to use methods and tactics far in access of those which would reasonably be used in investigating misconduct. Neither White nor the agency could show any other situation were similar tactics were used. Nor did the Agency show where others similarly situated were treated the same way. In fact, the testimony showed others received lesser punishment. The linchpin of federal personnel management is fairness; employees who are similarly situated are entitled to similar treatment. *Wiburn v. Department of Transportation*, C.A.Fed. 1985, 757 F.2d 260. The Agency did not meet its burden and the Administrative Judge's decision regarding Ellis' affirmative defense should be overruled.

Again, without comment from the Court of Appeals, it is impossible to know why they affirmed. 5 U.S.C. § 7703 requires the Court of Appeals to review the record and set aside any agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, obtained without procedures required by law, rule of regulation having been followed, or unsupported by substantial evidence. Congress has set out an affirmative defense for whistle blowing in 5 U.S.C § 1221. Congress also specifically mandated a high standard of clear and convincing evidence the Government must meet to overcome a prima facie case. The Agency must prove by clear and

convincing evidence that it would have taken the same personnel action against Ellis even in the absence of his protected disclosure. *Marano v. Department of Justice*, 2 F.3d 1137 (C.A.Fed. 1993) The Court of Appeals in its review must hold the government accountable to that standard. They did not in this case.

II. IT WAS ERROR FOR THE APPELLATE COURT TO AFFIRM WITHOUT COMMENT, THE DECISION OF THE BOARD TO DENY ELLIS THE AFFIRMATIVE DEFENSE OF HARMFUL PROCEDURAL ERROR.

Ellis cited three (3) affirmative defenses in his appeal: (1) Retaliation for Whistleblowing activity, (2) Reprisal for EEO Activity, and (3) Harmful Procedural Error. In an order dated February 16, 1999, Administrative Judge Puglia required Ellis to submit information concerning each of these defenses so that she could rule in advance whether they would be allowed. Ellis responded to the order on March 17, 1999.] As a result of a prehearing conference, the Administrative Judge struck the affirmative defense of Harmful Procedural Error in an order dated April 23, 1999, without any written findings explaining her rationale for her decision. That ruling denied Ellis the ability to present testimony and evidence concerning that issue.

Ellis' affirmative procedural error defense is that the Agency, in an attempt to obtain information they could use in retaliation for Ellis' activities, searched Ellis' e-mail and other computer files, in violation of Army regulations AR 380-53 and AR 380-19. These regulations specifically outline procedure to be followed when electronic monitoring is conducted by the agency. The procedures were deliberately ignored by the Agency when they monitored and copied Ellis' e-mail and hard drive.

Ellis' position was supported by two of the Agency's employees who were responsible for the development of policies and procedures, ensure their implementation, ensure they are followed and ensure system security. Both John W. Teegarden, Information Systems Security Program Manager, and Sgt. Michael E. Rodgers, Network Administrator, testified that what the agency did was in violation of policy/procedure and illegal. Sgt. Rodgers testified he was told by the only other Information Systems Security Program Manager, John McCarthy, that the Agency's actions were violative of policy/procedure and law. Sgt. Rodgers testified he believed a soldier under his command was given an illegal order by Steve White to monitor and copy Ellis' e-mail and hard drive. Both Teegarden and Rodgers testified that, according to well established policy and procedure, White was to go through either Teegarden or McCarthy prior to issuing any such orders or taking the action he did. Neither were consulted or told of what was occurring.

In the Agency Response, pages 11 to 13 they attempt to legitimize their actions while admitting they may have violated their procedures. They admit search of "e-mail for Freedom of Information Act purposes is not a properly authorized investigation as defined by AR 380-19," and that "a management search for evidence of employee misconduct is not a properly authorized investigation under AR 380-19." Their rationale for proceeding as they did was that a "reasonable cause or suspicion of employee misconduct is also permissible as official business." Their stated positions are extremely contradictory and cannot be reconciled. Their regulations are not as vague and open ended as they would have one believe.

The Agency is bound by the regulations which it has promulgated, even though, absent such regulations, the agency could have exercised its authority to take the same action on another basis. *Longoria v. Office of Personnel Management*, 78 MSPR 242 (1998) The Agency is required to act in accordance with

procedures it adopts for itself and the Board will enforce employee rights derived from such rules and regulations. *Campbell v. U.S. Postal Service*, 75 MSPR 273 (1997)

The result of the Agency's search in violation of their own procedures, and arguably the law, resulted in their obtaining information used to stack the charges against Ellis so they could terminate him. The agency knew the charges they had on Ellis prior to the search were not sufficient to terminate him. In the Agency's desire to accomplish that goal, motivated by their desire for retaliation, they violated their own procedures. There was no other reason for the improper search of those files. The proposing and deciding officials had no complaints from anyone concerning Ellis's use of e-mail. The "fishing trip" search of Ellis' electronic files was purely a witch-hunt orchestrated to find anything they could use to punish Ellis for his whistleblowing activities, protected though they were. The Agency had no complaint which would justify their electronic monitoring under the regulations cited above. Absent a complaint justifying electronic monitoring under the regulations, the Agency would not have obtained much, if any, of the information relied upon in its determination to remove Ellis. A witch-hunt for information to use against an individual was exactly the kind of Agency activity the regulations were designed to prohibit. Ellis was entitled to pursue his affirmative defense of Harmful Procedural Error. The striking of the defense by the Administrative Judge was error.

The Court of Appeals, without comment, affirmed the Agency's actions on this issue. That lack of comment is perplexing considering the privacy issue at stake. It was error for the Court of Appeals to approve such action without any comment as to why such an invasion was justified.

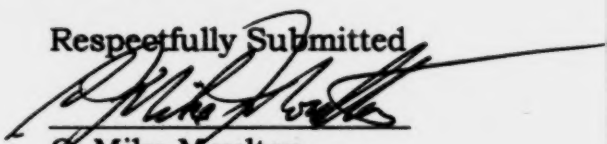
Both issues obviously involve workplace practices. While historically great deference is given to the employer, it is important that the employers be

strictly held to the wishes of Congress regarding whistle blowing and workplace procedural error. Ferreting out corruption is an extremely important issue that should not be condoned without comment. To do so sends a chilling message to those who want to do what is right. The employers must be held accountable and be cognizant that the law will go to great lengths to protect those blowing the whistle.

Privacy in the work setting must also be protected. Obviously privacy in the workplace cannot be absolute. However, when the Government creates regulations which spell out the limits of that privacy and what procedures they must follow to invade that privacy, the Government must be held accountable. They must know that if they set down the boundaries in their regulations, they will be held to those boundaries.

For the foregoing reasons, Ellis respectfully requests this Court to grant Certiorari.

Respectfully Submitted,



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APPENDIX

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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

00-3348

DAVID C. ELLIS,
Petitioner,

V.

DEPARTMENT OF THE ARMY,
Respondent

Judgment

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). CH1221990231-W-1.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (BRYSON, GAJARSA, and LINN, Circuit Judges.)
AFFIRMED. See Fed. Cir. R.36
ENTERED BY ORDER OF THE COURT

DATED: JUN 6 2001

s/_____
Jan Horbaly, Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID C. ELLIS,
Appellant,

DOCKET NUMBER
CH-1221-99-023 l-W-1

V.

DEPARTMENT OF THE ARMY,
Agency.

DATE: APR 18 2000

C. Mike Moulton Esquire, Moulton & Long PLLC, Elizabethtown, Kentucky, for the appellant.

Daniel M. Kininmonth. Esquire, Fort Knox, Kentucky, for the agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter.
5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title *5* of the United States Code, section 7702(b)(l) *(5* U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in. an appropriate United States district court. *See S* U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be

entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful 1o file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: s/_____
Robert E. Taylor
Washington, D.C. Clerk of the Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID C. ELLIS,

Appellant,

DOCKET NUMBER
CH-1221-99-023 l-W-1

V.

DEPARTMENT OF THE ARMY,
Agency.

DATE: APR 18 2000

C. Mike Moulton Esquire, Moulton & Long PLLC, Elizabethtown, Kentucky, for the appellant.

Daniel M. Kininmonth. Esquire, Fort Knox, Kentucky, for the agency.

BEFORE
Nina Puglia
Administrative Judge

BENCH INITIAL DECISION

INTRODUCTION

JUDGE PUGLIA: Thank you both for your closing arguments, for all the work you put into this case. I will try to keep my decision as brief and to the point as possible.

I need to state a few basic facts first. The appellant was a telecommunications specialist, GS-12, for the U.S. Army at Fort Knox. On October 30, 1998, the agency proposed his removal based on five charges. The charges are lettered rather than numbered, but there are five of them. Charge A is unauthorized entry into a Government office. The second, Charge B, is possession of an unauthorized key. Charge C is misuse of Government property. Charge D is a conviction for entering the Fort Knox military

reservation in violation of law. And Charge E is failure to follow a supervisor's instructions.
Although I really appreciate Mr. Moulton's attempt to go through these in the order they were given, I think it probably makes more sense to start with D, which is the conviction.

Charge D

The appellant was convicted of entering Fort Knox for purposes prohibited by law or lawful regulation in violation of Title 18 U.S.C. ~ 1382. The specifications are (1) that on October 29, 1998, he appeared in District Court at Fort Knox, Kentucky and that upon his plea of guilty, he was convicted of entering the Fort Knox reservation for purposes prohibited by law or lawful regulation and (2) that the Court ordered the appellant to pay $150 fine and $30 in restitution for theft of Government property. Mr. Moulton has brought to everyone's attention there was no conviction of theft. However, in determining how charges are to be construed, the Board will examine the structure and language of the proposal notice. It seems to me this charge is really about conviction for entering a military reservation for purposes prohibited by law or lawful regulation, an issue which is res judicata. I sustain this charge because the U.S. District Court has already found him guilty beyond a reasonable doubt.

Charge B

Now that we know Charge D has been sustained, I think it makes more sense to go back and look at charge B, which is possession of an unauthorized key. The parties stipulate that the appellant possessed a key to Room 1024 at Fort Knox. Sergeant Colton, the key custodian, testified that all the legitimate keys say "do not duplicate" on them, have serial numbers and they have been engraved with those serial numbers. The Government alleges the appellant was directed by

his supervisor, Ms. Wolfe, to turn in his legitimate key to Room 1024, and the appellant did indeed surrender this key to Sergeant Colton, on December 4, 1997. The agency further alleges that agency found the appellant in possession of an unauthorized key to Room 1024 on July 16, 1998, and the key recovered from him been duplicated without authorization in violation of Fort Knox security and, in particular, an official memo relied upon in the proposal.

The appellant's response to this was very curious to me. He did not deny having a key to Room 1024 that lacked a serial number or the words "do not duplicate." His initial response was that Ms. Wolfe gave him the key in question, but he hastened to add he was sure she wouldn't remember having done so. We've heard testimony that Ms. Wolfe was a Branch Chief, and I find it extremely unlikely that a Branch Chief at Fort Knox would have commercially copied a Fort Knox key and given it to one of her subordinates. I find it even more unlikely that she would have given such a key to her subordinate and banished the memory of the event from her mind.

The appellant's version of this incident is inherently incredible for another reason. He himself has 27 years of federal service; if someone handed him a commercially copied key to a room in a military facility, he would have been out of his mind to take that key. Had Ms. Wolfe given him such a key, he surely would have brought this event to the attention of the Inspector General's office, especially given his feelings -- made evident through his e-mail entered into evidence -- that he did not like Ms. Wolfe and thought she was trying to pick on him. At any rate, the first time he looked at that key, he knew, or had every reason to know, it was not an official key and he should not have it, no matter who gave it to him.

The appellant called James Woodruff to the stand, and attempted to get Mr. Woodruff to say that Sergeant Colton did not maintain adequate key control

over Room 1024. Mr. Woodruff testified he believed key control procedures were not always followed at Fort Knox and that it was "possible" an unofficial key could be "floating around." Mr. Woodruff denied, however, any specific knowledge that Sergeant Colton or Ms. Wolfe had circulated or permitted possession of an unauthorized key. Mr. Woodruff would not or could not identify a single individual with an unauthorized key, so I find his testimony that such keys existed unpersuasive.

I also think that it is very suspicious that the appellant complained to Colonel Balaban about having to give up his key to Room 1024 and when Colonel Balaban replied "I'm sorry, you have to turn in your key" it took the appellant two days to do so, which provided him with the opportunity to duplicate the key himself. The key register shows the appellant turned in his key to Room 1024 in December 1998, when he stopped working there. The appellant was probably annoyed about having to turn in the key and appears disgruntled enough to make a copy. I do not think it is likely that Ms. Wolfe copied the key or that the appellant would have let her get away with it. Turning in other employees for alleged improprieties was something of a passion with him, which adds to the inherent implausibility of his story.

The appellant stressed the fact that when Ms. Wolfe ran into the appellant's wife at the supermarket, Ms. Wolfe said the issue of the key was becoming very complicated. But I ask you: what on earth was Ms. Wolfe supposed to say to this woman? Not a single other issue in the case recommends itself as a suitable topic for casual conversation with the appellant's wife. "How interesting that your husband says you didn't enjoy your extramarital affair with a bodybuilder because steroids had shrunken his sex organs?" Or, "you must be relieved to hear your husband does not admire my rear end because he thinks it's too fat?" I pity Ms. Wolfe running into Mrs. Ellis at the store. She

was expected to talk about the agency's case against Mrs. Ellis's husband and express her hope that he would return to them, but almost every aspect of this case would make for extremely awkward conversation with Mrs. Ellis. Furthermore, it is undisputed that the appellant was issued a key by Sergeant Colton, on Ms. Wolfe's authority, and Mrs. Ellis did not testify that Ms Wolfe specified she was talking about a key Ms. Wolfe gave the appellant at any particular time. I think Mrs. Ellis probably wanted to believe that is the key Ms. Wolfe was talking about, but I do not think her testimony about that key is sufficient to rebut the testimony of Ms. Wolfe, who stated unequivocally that she did not give the appellant any commercially duplicated key without a serial number. I find it very doubtful that Ms. Wolfe would have had such an item in her possession. If she believed the appellant should be given a key, well, that is what Sergeant Colton is there for.

Taking all the evidence into account, I therefore sustain the agency's second charge, Charge B.

Charge A

The next charge, chronologically at least, is Charge A, which is unauthorized entry into a Government office. Mr. Moulton argued Room 1024 is not an unauthorized place. He is right to the extent that the door does not have a special sign on it that says no access and, if you work in there, you are allowed to go in, at least during duty hours. But I cannot help notice this door had keys -- strictly rationed keys -- and these keys had serial numbers and "do not duplicate" imprints on them. They were not given out as souvenirs. Colonel Balaban ordered the appellant to turn his in when his duties no longer required access. Bear in mind here, we are talking about Fort Knox, not some boarded-up crack house. The public expects Fort Knox to stay secure and when doors in there are locked, that means unauthorized

people, people without keys, are not supposed to go in.

The first specification of Charge A is that on July 15, 1998, at what the Army calls 0600 hours, the appellant was in Room 1024 without authority as seen by Network Administrator Michael Moore. Before I analyze the testimony given about this charge, I feel constrained to point out that on the previous day, July 14, 1998, the appellant made a 20-minute phone call, starting at 5:59 a.m., to the private residence of a lady named Patricia Kaserman, from inside Room 1024, with a telephone he plugged into the cubicle of a contract employee Brain Culver. *See* Agency File, Tab 4(j), Exhibit 16.

But returning now to the next day, July 15, Mr. Moore testified he went into Room 1024 at around 6 a.m. because someone called him at home to report a network problem. So Mr. Moore got dressed, and he entered Fort Knox before dawn. He then made his way to Room 1024. At his desk, he heard the spring door closing quietly behind him. He checked the empty cubicles to see if someone had followed him in. Of course, he was a little concerned about this noise and he stuck his head out the other door. That's when he saw the appellant scurrying away. Mr. Moore was spooked, reported the event to his supervisor, and had absolutely no reason to lie about what he had seen.

The appellant does not dispute Mr. Moore saw him, but he has a very different version of events. He claims to have seen Mr. Moore earlier, inside Room 1024, as though it was a normal occurrence. Mr. Moore's version is much more plausible because he immediately filed an incident report.

The appellant says his entry into the room was not unauthorized, and he had provided a group of various, inconsistent, sometimes outrageous reasons for why he was in that room. The fact that he has persisted with variations on these reasons for such a length of time I also find very troubling and I guess I

will talk about that later when I talk the appellant's potential for rehabilitation.

At his deposition, the appellant said he arrived at work early and was taking boxes out to the loading dock. According to the appellant, when he came back down the hallway on which Room 1024 is located, he just grabbed the handle of the door because he tends to grab the handles and see if they open when he walks down hallways. So his first excuse that he tried opening the door out of habit and has no particular reason for doing so. He claims the door was indeed open. He also said he went inside just because the room was part of his division and the door was open. He did not mention that he had happened to be in there the day before, at 6 a.m., calling Ms. Kaserman from Mr. Culver's cubicle. He also did not mention that he called Ms. Kaserman from Fort Knox at approximately 6 a.m. on July 1,2, 8, 9, and 10, 1998. According to the appellant, he idly grabbed the handle of the door and went inside for no reason other than that it was in his "division" and it was open. But Mr. Moore testified he had to unlock the room when he arrived.

After Mr. Moore filed his report, Mr. Moore's supervisor referred the matter to Ms. Wolfe. Ms. Wolfe said that she would go into Room 1024 early the next day to see if the appellant would try to gain access to the room again and what he was up to. Division Chief Stephen White was also apprised of the matter and Mr. White personally locked both doors to Room 1024 on July 15 at the end of the work day.

Then, on July 16, 1998 at about 6:00 o'clock in the morning, the appellant was caught in Room 1024 again. I find this especially troubling because he had been caught the day before and he left without making his customary phone call to Ms. Kaserman. And yet, he could not resist coming back the next day to try to do it again. At his deposition, he said he had to destroy more boxes in the basement. But he has

been very hazy about these alleged boxes in the basement. Sometimes he says he was going to get boxes, sometimes he says he was taking them to a loading dock, and sometimes 14 says he was destroying them. His testimony is very inconsistent. Moreover, his inarticulate manner appears contrived to keep from having to tell a coherent story on this issue. The appellant's inconsistent versions of events were temporarily self-serving, but when new questions were asked, his stories changed.

Anyway, I would like to talk a little bit about the appellant's stated reasons for returning to Room 1024 on July 16. Was that feedback?

MR. MOULTON: We didn't hear it.

JUDGE PUGLIA: I heard a strange voice. Anyway, the appellant said he thought he saw a mouse tail. He does not claim the door was open on July 16. Instead, he says he saw a mouse tail, then used a key to Room 1024 that he kept in a filing cabinet in his cubicle -- the unauthorized key. In essence he is telling us he saw a mouse tail sticking out from under the door, went to his own cubicle, took his Room 1024 key out of his filing cabinet, returned to Room 1024, and went inside to catch the mouse. After he got the key and went inside, he says he did not find the mouse but he noticed some mouse droppings on the floor and crawled around on the floor to collect these droppings. Now, later he says that he cannot recall whether he was in the process of getting more boxes or taking more boxes out when he noticed the tail under the door. He did not volunteer that he called Ms. Kaserman while in Room 1024, but admitted he did when asked. According to the appellant, calling Ms. Kaserman was not his reason for entering the room, but while he was there he decided to call her. According to the appellant, he first looked for the mouse and then called Ms. Kaserman and spoke to her, while holding the filthy mouse droppings in his hand. When Ms. Wolfe discovered him, he told

her he had been going to get boxes, but that he never got to get to the boxes because he went through Room 1024 to look for the mouse.

Later, when he was asked about the mouse, he said he thought he could have seen it on both July 15 and July 16. He claimed he could not remember whether he had first seen the mouse on the July 16 or July 15. His story was very, very unpersuasive. It kept shifting and it is inherently improbable. I also add that the appellant says he still had the droppings in his hand when confronted by Ms. Wolfe, but did not think to show them to her to prove his story.

Equally disturbing to me is his e-mail message to Ms. Kaserman later that day. He e-mailed her, "pretty clever of me to think of something that quick. Don't know if she believes me or not, but who cares? There are plenty of other ways to make calls." To this, Ms. Kaserman responded, "going to miss our morning calls. I'm going to go into withdrawal for sure." I think it is clear these morning calls were habitual and the stories of mice and boxes are untrue. Although the appellant was charged with unauthorized entry into the Government office, it makes a big difference to me that when he was caught, he gave such preposterous stories for what he was doing there, because it gives rise to suspicion about what he was doing there. We have heard a lot from Mr. Moulton about alleged improprieties of the search and the investigation into the appellant's conduct and his e-mail. But it certainly seems reasonable to me that if you have an individual criminally entering Fort Knox in the wee hours, using an unauthorized key to break into a room used for telecommunications, and placing clandestine phone calls from other people's phone jacks, serious investigation is warranted. I sustain both specifications of Charge A, unauthorized entry into a Government office.

Charge C

Mr. Kininmonth describes this charge, misuse of Government property, as the big charge because he is very concerned about the sexual explicitness of all of this e-mail the appellant sent. Frankly, I don't think the sexually explicit content of the e-mail is the big problem. The agency should be relieved that the appellant's motive for his devious actions (criminally entering Fort Knox, obtaining an unauthorized key to an area used by key computer specialists, plugging a phone into a computer or telecommunications specialist's line, and placing clandestine phone calls to people outside the agency at 6:00 a.m.) was merely to obtain sexual gratification and not a heart-to-heart talk with, say, the Unibomber. But nevertheless, I need to go through and make findings about all the individual specifications.

The first specification is that on August 5, 1997, the appellant and Nancy Williams sent each other sexually explicit e-mail. The appellant admits this. He admits it was done on a Government computer. He also said he thinks this is somehow okay under the joint ethics regulations, under a rather strange and tortured interpretation, but he does admit that he did it. So I sustain the first specification.

The second specification is that on January 6, July 29, and August 4, 1998, the appellant sent personal e-mail messages to Darlene Fry (phonetic) during his duty hours. The appellant also admits that specification and so I sustain it.

The third specification is that on January 8, 1998, the appellant sent Denise Jett (phonetic) an e-mail message which was sexual in nature. The appellant admits he sent her a personal message, but he denies it was sexual in nature. I have looked at that message which is available as the agency's Exhibit 9. It in, the appellant writes: "I wish I could have been there to jump in the tub with you, Mr. Bubble. He has good hands and a gentle touch, loves to explore, too." I

think this message, especially in connection with the appellant's other messages, is more likely than not to be sexual in nature. I therefore sustain the third specification.

The fourth specification is that on January 8, 1998, the appellant and Nancy Williams sent each other sexually explicit e-mail. The appellant admits that specification and therefore, it is sustained.

The fifth specification is that on June 8, 1998, the appellant sent e-mail to Susan Rosera (phonetic) which was sexual in nature. The appellant denies the specification. However, this e-mail message is available at Agency Exhibit 14. In it, the appellant told Ms. Rosera he was going to buy her drinks, go park someplace, tease her, and seduce her. I find these remarks to be sexual in nature and, therefore, sustain the specification.

The sixth specification is that on January 24, 1998, the appellant and Karen Miller sent each other e-mails which included inappropriate language about using Government resources in an unauthorized manner. The appellant admits he exchanged e-mail, but he denies using inappropriate language about using Government resources in an unauthorized manner. Without reference to the relative importance of this specification, I am going to make what I believe are the necessary findings to adjudicate this specification. The appellant sent Ms. Miller an e-mail on January 24, 1998, saying; "do you ever think about taking a transfer somewhere else to get away from that rash of shit you're getting?" He also told her to tell her supervisor she and the appellant were talking ..about conference call procedures if her supervisor asks why she spends so much time on the phone with the appellant. The appellant argues this is not a cover story but I do not believe him. On its face, the e-mail appears to instruct Ms. Miller in a story to tell her supervisor to put her supervisor off the scent.

The seventh specification is that on January 27,

1998, the appellant sent e-mail to Karen Miller that was sexual in nature. The appellant admits the specification, and therefore, it is sustained.

The eighth specification is that on January 28, 1998, the appellant sent an e-mail message to Karen Miller which was sexual in nature. The appellant admits this specification and it is also sustained.

The ninth specification is that on February 10, 1998, the appellant sent an e-mail message to Karen Miller which was sexual in nature. The appellant admits sending the message but denies it was sexual in nature. I find it was sexual in nature and sustain.

The tenth specification is that on March 2, 1998, the appellant sent a sexually explicit e-mail message to Denise Jett then asked her if it made her "horny." The appellant admits the specification and, therefore, it is sustained.

The eleventh specification is that on April 7, 1998, the appellant sent an e-mail message to Kaneitha Mann (phonetic) which was sexual in nature. The appellant admits this specification and therefore, it is sustained.

The twelfth specification is that on April 16, 1998, the appellant sent an e-mail message to Susan Rosera which was sexual in nature. The appellant admits the specification and it is sustained.

The thirteenth specification is that on May 4, 1998, the appellant created a sexually explicit Word document. The appellant admits the specification and therefore, it is sustained.

The fourteenth specification is that on May 8, 1998, the appellant created another sexually explicit Word document. The agency stressed its argument that the appellant appeared to be writing chapters of a sexually explicit fiction while on-duty at. his Government job. The appellant admits the specification, although at the hearing he described the writing as "a message between two individuals" rather than an attempt at erotic fiction. Based on the

appellant's admission, the content of the document (masturbatory) and its style (ferociously illiterate, even when measured against the appellant's other writings), I find the agency has proven its allegation and I sustain this specification.

The fifteenth specification is that on May 15, 1998, the appellant sent four e-mail messages to Pat Kaserman which were sexually explicit. The appellant admits the specification and, therefore, it is sustained.

The sixteenth specification is that on May 8, 1998, the appellant sent an e-mail message to Pat Kaserman which was sexually explicit. The appellant admits this specification and, therefore, it is sustained.

The seventeenth specification is that on May 20, 1998, the appellant sent an email message to Pat Kaserman which was sexually explicit. The appellant admits the specification and, therefore, it is sustained.

The eighteenth specification is that on July 14, 1998, the appellant and Nancy Williams sent each other e-mail which was sexual in nature. The appellant admits the specification and, therefore, it is sustained.

The nineteenth specification is that on July 14, 1998, the appellant and Susan Payne sent each other e-mail which was sexual in nature. The appellant admits the specification and, therefore, it is sustained.

The twentieth specification is that on July 16, 1998, the appellant sent Pat Kaserman an e-mail message which was sexually explicit, its subject designated as "hello." The appellant admits the specification and, therefore, it is sustained.

The twenty-first specification is that on July 16, 1998 the appellant sent another e-mail message to Pat Kaserman which was sexual in nature, its subject designated as "like .your punishment." The appellant admits the specification and, therefore, it is sustained. Almost being caught on the telephone with Ms. Kaserman that morning seems to have had a stimulating effect on him.

The twenty-second specification is that on July 31, 1998, the appellant sent yet another e-mail message to Pat Kaserman which was sexual in nature. The appellant admits this specification and, therefore, it is sustained.

The twenty-third specification is that from May, 1997 to September, 1998, the appellant made long distance telephone calls on Government telephones that were personal in nature and made at Government expense. According to the specification, many of these calls were sexually explicit or sexual in nature. The agency also specified that appellant encouraged other individuals to use Government telephones for unauthorized purposes and informed them how to do so.

This specification can be divided into three distinct components: personal calls on Government time, more of the sexually-explicit stuff~ and encouraging other people to misuse the Army's phone system.

The appellant admits the first part of the specification. From May, 1997 to September, 1998, he agrees he made long distance telephone calls on Government telephones that were personal in nature and made at Government expense. I believe restitution for these calls was also part of his criminal sentence. Because the appellant admits the first part of this specification, I find the agency has met its burden here.

The second part is that many of these calls were sexually explicit or sexual in nature. The appellant also admits this part. Because the appellant admits the second part of this specification, I also find the agency has met its burden.

However, the last part, which is the most serious part of the specification, is about encouraging other individuals to use Government telephones for unauthorized purposes and informing them how to go about it. The appellant denies this part of the

specification. I find, however, there is more than preponderant evidence in the record to show the appellant encouraged other individuals to misuse Government telephones. The first bit of evidence is that on January 27, 1998, the appellant e-mailed Karen Miller, writing, "Here is one way you can call me and it won't show up on any call detail report. Call me on user X800 number which is 800-223-3735. You will get our auto attendant who will call my extension. It will ring three times. If not here, the auto attendant will pull it back and give the caller the option to leave a voice mail message. This is password protected so you can leave any type of message you want." He also told Karen Miller, "we'll do the one ring bit," because more than one ring on her phone would be answered by someone else. He also told Karen Miller to tell her supervisor her phone calls were about conference calls and he knew the administrator and could delete the e-mail she sent him.

The second piece of evidence is in Agency Exhibit 9, where we can see the appellant told Ms. Jett she could give quote, "her friend in Florida," unquote, his 800 number. He wrote as follows: "Hell, you can give her my 800 number if you like. Just need her name so I know who it is." There is also evidence in Exhibit 9 that Ms. Jett called or tried to call the appellant.

Third, Pat Kaserman testified at this hearing the appellant called her at work and tried to excite her on the phone and he sent her e-mail. She further testified he gave her his password, so she could leave him private messages on his voice mail. She admits they had sexy conference calls on her Government 1-800 system.

I find all of this evidence together shows the appellant did indeed encourage other individuals to use Government telephones for unauthorized purposes and informed them how to do so.

Having sustained all twenty-three

specifications, I sustain Charge D.

Charge E

That leaves us with the last charge which is failure to follow a supervisor s instructions. The agency charges that on July 16, 1998, during an investigative interview, the appellant was told by his supervisor his duty hours would be *07:30* to 1600 hours effective July 27, 1998. The appellant was also told that until the investigation was completed, he was to report no earlier than 7:30. According to this last charge, on July 27, 1998, the appellant's supervisor found him at his desk at 6:30 a.m., after having given her order prohibiting it.

The appellant does not deny that Ms. Wolfe, who was his supervisor, ordered him not to report to work before 7:30 a.m. The appellant raised two arguments against sustaining this charge. The first is that Charge E is not really a charge because it is not a criminal charge. This logic, despite its obvious appeal to criminals, is unpersuasive in an administrative tribunal. Charges that do not rise to the level of criminal misconduct are the norm here, and may easily support removal.

The appellant also states he did not believe Ms. Wolfe had the right to tell him not to show up before 7:30. According to the appellant, this had something to do with the settlement of an EEO claim. This EEO claim, which is in the record, does not support his contention. Moreover, a federal employee must follow his supervisor's order so long as that order is not dangerous. The Federal Circuit upheld this proposition in 1995[1] and the Board has applied it as recently as

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[1] *Cooke v. United States Postal Service,* 67 M.S.P.R. 401, 407-08 (an employee does not have the unfettered right to disregard an order merely because there is substantial reason to believe the order is not proper; he must first comply with the order and then register his complaint or

last month.[2] Ms. Wolfe's order not to report for duty before 7:30 did not expose anyone to physical danger. Accordingly, I sustain Charge E.

Retaliation for Whistleblowing

Now, we need to move onto the affirmative defenses. The first one is retaliation for whistleblowing. The appellant alleges his removal was taken in retaliation for a written report he anonymously made to Colonel Roger Balaban in October 1997. This report has been known throughout this hearing as the TWISI, which I believe stands for "the way I see it." The appellant further, alleges his report disclosed a violation of an Army regulation, a gross waste of funds and gross misconduct.

We have discussed the burdens of proof before, but I will just remind you that the appellant bears the ultimate burden of proving this affirmative defense. To establish a prima facie case of retaliation for whistleblowing he must show he made a protected disclosure under 5 U.S.C. § 2302(b)(8), and that the disclosure was a contributing factor in the removal he appeals. If the appellant meets this burden, the agency must prove by clear and convincing evidence it would have taken the same action absent the disclosure. Under the Board's current case law, I do not need to make a finding about whether the appellant's disclosure was a protected disclosure.[3] I can presume

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grievance, except in certain limited circumstances where obedience would place the employee in a clearly dangerous situation, or where complying with the order would cause him irreparable harm), *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table)

[2] *Eichner v. United States Postal Service*, DC-0752-97-057 1-I-i, available on Westlaw.

[3] I do note, however, that although the appellant disclosed contract employees, including Brian Culver, were making

it and jump to the question of whether it was a contributing factor in the removal he appeals. We all agree that the appellant did make this disclosure as he claims.

When we look at the disclosure the appellant made and the results, we can all agree that the result was an AR15-6 investigation; however, the result of this investigation did not portray either the proposing or deciding official in a negative light. Some unrelated person suffered due to the TWISI, and was not even disciplined, but it posed not threat to the proposing official, Mr. White or the deciding official Colonel Balaban.

The appellant urges me to look at Exhibit M, page 114, which is a letter from Barbara Wolfe to Steve White, stating she feels members of her staff are going to be held responsible for the allegations in the TWISI and could possibly lose their jobs. The appellant says Ms. Wolfe's concern proves the TWISI was a contributing factor in his removal. I do not buy that explanation, but I still think the appellant has indeed shown the TWISI was a "contributing factor" because under the Whistleblower Protection Act of 1989, as amended in 1994, because there really just has to be a connection in time. The TWISI report was submitted anonymously in October, 1997 and the appellant's removal was proposed within the next year. So I find that the TWISI report will be considered a contributing factor in the removal he appeals.

To rebut the appellant's evidence, the agency must show by clear and convincing evidence it would have taken the same action absent the appellant's disclosure. Mr. White testified he would have proposed removal of anybody of the appellant's grade and type of

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unauthorized phone calls, the only evidence in the record of unauthorized phone calls by Mr. Culver were actually placed by the appellant from Mr. Culver's cubicle.

service who had done these sorts of things. Mr. Moulton urges me to look at the way the evidence was gathered against the appellant. He makes a loud argument that were this search carried out by law enforcement agents, its results would not be admissible in criminal proceedings against the appellant. The appellant was flagrantly insubordinate, surrendered an unauthorized key, and, moreover, pled guilty in a forum with authority to address his fourth amendment issues. The chain of events appears very natural, proper, and reasonable to me. Mr. Moore, who is not implicated in wrongdoing in any way and is just a person who happened to be in that room trying to fix a network problem, reported a strange event he had heard and seen that morning. When he reported opening the door and he looked in the hallway and he could see that. it was .the appellant. So he wrote an incident report.

Ms. Wolfe, when she got this report, thought she had better see what was up. That seems natural as well. Then when she found the appellant there the next day, she had ample reason for concern. Mr. White had locked the door; the appellant's story about getting boxes or destroying boxes lacked internal validity; and his yarn about the mouse was so preposterous, I think it was very natural for the agency to begin some investigation as to what the appellant was doing in that room.

The appellant also argues, well, so he did not have permission to be there; who cares? Why would that trigger an investigation? I think it is very important if someone is found sneaking around in Fort Knox before dawn, plugging a telephone into lines, making phone calls and has no coherent explanation for being there other than looking for a mouse. His conduct raised an obligation on the part of the agency to figure Out what was really going on. It turns out, what was only going on was only some type of virtual sexual activity, but it could have been something

much worse. It could have been something that struck at the heart of Fort Knox security.

The appellant's attorney also points out that the agency's secret search of his client's e-mail and hard drive were, if not illegal, at least ungentlemanly and suggests the appellant was being unfairly targeted in retaliation for his whistleblowing activity. After all, says the appellant, all he was doing was making "private" calls. But phone sex, or making "private" calls to female friends, would not rank on any competent investigator's top ten list of why someone would break into Fort Knox. Searching the appellant ~ computer while he was gone was a very reasonable precaution. The appellant also complains that Mr. White did not do it alone, that Mr. White presented himself as the person who carried out this investigation; but in fact, he needed the help of others to do it. I could not help noticing that Mr. White was a little long in the tooth, and the bright young men with requisite computer experience he recruited to help him appeared to have been given information on a very need-to-know basis. Mr. White's methods of investigation do nothing to persuade me that the agency took this action in retaliation for whistle-blowing. The agency proved the appellant possessed an unauthorized key to Room 1024, gained unauthorized entry into that area, encouraged other persons to misuse the Government phone system, was flagrantly insubordinate to Ms. Wolfe, and was criminally convicted of entering Fort Knox. The appellant has not presented evidence to contradict Mr. White's testimony about the legitimate, non-retaliatory reasons he had to request investigation of the appellant's computer and telephone use or propose the appellant's removal. The appellant also has not presented evidence to contradict Colonel Balaban's legitimate, non-retaliatory reasons he had to sustain the proposed removal. I therefore find the agency has shown by clear and convincing evidence it would have

taken the same adverse action against the appellant absent his TWISI disclosure. I conclude the appellant has not met his burden of proving retaliation for whistleblowing.

Reprisal for EEO Activity

The next affirmative defense is reprisal for EEO activity. The appellant alleges he was removed in reprisal for an EEO complaint he filed against Ms. Wolfe on December 8, 1997 after the auto-attendant functions of his position were taken away from him. Ms. Wolfe posted something on an employee computer bulletin board, while the appellant was on vacation. She announced the appellant would not be handling 800 services anymore.

The appellant originally raised a claim that the agency also reprised against him for an EEO action of some type in July 1998, but that was not discussed in closing argument and I did not hear any evidence about it at the hearing. So I find the appellant waived that claim and confine my remarks to his December 8, 1997 EEO complaint. The appellant bears the burden of proving the agency retaliated against him for filing his December 8, 1997 EEO complaint by a preponderance of the evidence. To do so, he must show (1) he engaged in EEO activity; (2) the accused official knew of his activity; (3) under the circumstances, his removal could have been retaliatory; and (4) a genuine nexus between EEO activity and removal. To determine nexus, I must weigh the intensity of the agency's retaliatory motive against the gravity of the appellant's misconduct.

The appellant has met his burden of showing he engaged in the EEO activity. There is ample evidence in the record he did file this EEO complaint as he claims. Although the appellant did not show Colonel Balaban was aware of his EEO activity, he did show Mr. White was aware of it, and under the Board's case law a proposing official can be implicated in

reprisal for filing an EEO activity as well as a deciding official. We can infer some retaliatory motive from the brief lapse of time between the appellant's complaint and Mr. White's proposal. The appellant filed his EEO complaint on December 8, 1997 and Mr. White, who is the alleged retaliatory official, proposed his removal less than a year later, on October 30, 1998. So I find that the appellant has shown his removal could have been retaliation under the circumstances.

However, the appellant also has to show a genuine nexus exists between retaliation and removal. And I think this is where the problem is. To establish a genuine nexus, the appellant must prove that retaliatory motive was a significant or substantial factor in removing him. The appellant's 4th Amendment issues do not come close to meeting this burden. Mr. White had compelling reasons to investigate the appellant and to propose the appellant's removal based on information obtained pursuant to that investigation. Colonel Balaban certainly had a valid reason -- no other choice, really -- but to remove the appellant for what he did. The proposal and the removal stem from legitimate management concerns for the security of Fort Knox's communications systems. Mr. White's investigation seemed to produce more information at every turn. I find the appellant has not shown genuine nexus between his EEC activity and his removal.

Efficiency of the service

The next thing I have to determine is nexus. Nexus means whether the misconduct charged is related to the efficiency of the service. Unfortunately for the appellant in this case, he was a Telecommunications Specialist with Communication Electronics Division. His misconduct went to the very heart of that mission. He misused the telephones, encouraged other individuals to misuse Government telephones, and went so far as to engage in criminal

activity, just to get in to misuse the telephones. Any of the five sustained charges, alone, would warrant a finding that discipline promotes the efficiency of the service.

Penalty

Having found nexus, I also have to determine whether the penalty of removal was within the tolerable bounds of reasonableness. To do this, we must look to the *Douglas* factors. Both parties went through and discussed the *Douglas* factors at length and that was very helpful for me.

The first *Douglas* factor is the nature and seriousness of the offense and its relation to the employee's duties, position and responsibilities including whether the offense was intentional, technical or inadvertent or was committed maliciously or for gain or was frequently repeated. This factor is crucial. The appellant was a Telecommunications Specialist, responsible for protecting the phone system's integrity. He was supposed to provide a list of unofficial calls and callers. And here he is, having entered Fort Knox unlawfully, with a key he knew was not a legitimate key because it did not have a serial number or the Government "do-not-duplicate" engraving. He used this key to carry out some secretive, thrill-seeking, looking-for-trouble behavior. Moreover, he involved himself in a web of lies when caught, which, upon hearing his testimony today, seems like it may be part of the fun for him.

The agency, to my way of thinking, is really misguided in how preoccupied it is with the sexual nature of these offenses. As far as I am concerned, the appellant could have been in that room with his unauthorized key, plugged into another employee's phone jack at 6:00 a.m., sharing recipes. It is the time, place, and manner that concerns me. The appellant could have chosen to make indiscreet phone calls from home; he could have made them from his car; he could

have made them from a phone~ booth. If he did not want his wife to know about them; he could have purchased a phone card and made them from any number of lawful places. But the Government cannot tolerate insubordinate employees rumbling around Fort Knox looking for thrills in the early hours of the morning. It is not going to work.

We have talked a little I think about the employee's job level and type of employment. A GS-12 employee works very independently and his job included monitoring others, which is a *Douglas* factor weighing heavily against him with the type of misconduct in this case. The employee has absolutely no past disciplinary record, and that is probably one of the saddest things about this case. He has a past work record which is marvelous. He has 27 years of service, excellent performance. He has received commendations and cash awards. In 1996, he was commended by Colonel Balaban himself. He has been given for a long time the highest performance ratings. The only time his performance rating slipped was when he developed what I suppose could be called "control issues" and began taking away people's 800 service without permission from his chain of command. This is the first indication in the record the appellant had become dissatisfied with the amount of power he was allowed to wield over other employees. He says he refused to follow his supervisor's order to come in at 7:30 until she put it in writing. But the decision to disobey his supervisor, based on his own broad and rather unsound interpretation of the a settlement agreement, does not bode well for somebody working at the GS-12 level.

The effect of the offense on the employee's ability to perform at a satisfactory level also is very sad. The appellant says he was decided to abuse the phones in May 1998, because management would not punish those persons he claims to have reported abusing the phones. In the federal Government, that is

what we call a disgruntled employee. His e-mail shows he became especially disgruntled after being caught with the phones and invented the mouse story. I have no reason to believe the appellant would not be even more disgruntled now. He still thinks it is quote "illegal" unquote for management to be perusing what he considers his own private e-mail. For someone with the appellant's years of service and his experience in the military, the appellant would have no reason to regard his Government e-mail, or anything on his Government computer, as belonging to him privately as opposed to the Government.

Mr. Moulton pointed out, and I thought this was very interesting, that the appellant's supervisors have lost confidence in him. Mr. Moulton says this does not matter. I disagree. I believe this is an important factor because the appellant's job required no immediate supervision. If his supervisors are concerned about whether he is trying to encourage people to use the 800 phone system in the way he has encouraged them in the past, they cannot really be expected to rely on him to preserve the integrity of the system in the future.

One of the other issues raised repeatedly by both sides is the consistency of the appellant's penalty with those imposed upon other employees for the same or similar offenses. Mr. Kininmonth believes sexually explicit e-mail between on-duty Government employees should be punished with the full majesty of the law. Mr. Moulton wants to know why the appellant's correspondents received more lenient penalties. Of course, in the case of the appellant' s correspondents, there were no criminal convictions, no unauthorized keys, and no rank insubordination. In addition, they were not trying to make their phone calls appear as though they were coming from another employee's desk. The agency could easily trace their calls back to them and demand restitution. This Colonel Carter, whom everyone talks about as making

so many personal phone calls, is not alleged to have made them from a phone plugged into someone else's cubicle. The agency billed him for the calls and he paid.

Oh, and the testimony about Mr. White and his Amway-esque blue algae pyramid scheme, diverting as it was, is not sufficiently similar to the appellant's misconduct for a place in the *Douglas* factor analysis. Likewise for the Turbo Tax program on his computer. I think both sides are seriously missing the point here. What the appellant was doing was not sitting at his desk, amusing himself by sending sexually explicit e-mail during a slow period. He was sneaking into other people's cubicles and trying to make it look as though those phone calls were coming from other people. That is a much more serious offense. If those phone calls had been a little more mature in their villainy, I shudder to think of the consequences. The appellant just happened to have' been taught by Mr. Culver, an employee there doing legitimate Government business -overnight. I note the appellant himself filed a whistle-blowing complaint saying these contract employees including Mr. Culver were misusing the telephone. And what does the appellant do? He goes into the cubicle of this man, Brian Culver, whom he has accused of misusing the phone, and makes his own private phone calls from Mr. Culver's cubicle. That kind of behavior is so much worse, so much more lacking in integrity, and so much more malignant than taking responsibility for his own misuse of the phones at his own desk.

Mr. Kininmonth emphasized the notoriety of the offense. I disagree with him here, but I think our disagreement is based more on our individual views about the sexual aspect of the misconduct at issue. I do not think notoriety is that big a deal, if only because the appellant went out of his way to keep his activities secret. It is probably in the best interest of the Government that, if wannabe burglars of the

appellant's caliber can break into locked rooms at Fort Knox, the affair be kept out of the press. The agency has better reasons than the appellant for keeping this matter quiet. But I also think that by stressing the sexual nature of the offenses charged, the agency is underestimating the serious consequences of what can happen when disgruntled employees decide they want to get into Fort Knox at 5:30 or 6:00 in the morning with a serial-number-free key? This is a more serious matter to my mind than the type of e-mail the appellant was sending.

I think there probably is not too much dispute about the clarity with which the appellant was on notice to avoid the misconduct at issue. He signed a memorandum acknowledging receipt of standard operating procedures and received briefing on the joint ethics regulations. The appellant's stealth also works against him here.

Now we get a really serious *Douglas* issue: the appellant's potential for rehabilitation. I find the appellant has not shown good potential for rehabilitation. He has lied, brazenly, repeatedly, inconsistently, about the material facts of this case and also about a number of collateral issues in which lies seemed designed more to amuse the appellant's sense of bravado than to convince anyone of his innocence. $it a sworn statement to the CID, he denied soliciting anyone besides Ms. Kaserman to do anything suggestive in nature. For example, in Exhibit 12, the appellant wrote to Ms. Miller, "I'm more of an ass man, not a big ass man either, but a nice firm tight ass, the things you can do to it. What about you? Describe yourself and don't leave anything out. As for me, I'm about five foot, seven, 145 pounds, brown hair and eyes and always looking for adventure, like phone sex, exchanging pictures and have taken video tapes of some good friends in Arizona." The appellant could not truly believe he had not solicited anyone besides Ms. Kaserman to do anything suggestive in nature.

Also, there are other problems with the appellant that I think bode poorly for rehabilitation. He has expressed absolutely no remorse. Mr. Moulton reminded us that Ms. Williams also expressed no remorse. But Ms. Williams' defiance does not make the appellant appear any more remorseful than he was. The appellant testified he learned something. What did he learn? He says, "I didn't know you could retrieve the e-mails." Basically he learned how he got caught. He did not demonstrate that he learned anything other than how to avoid getting caught next time.

The appellant says he regrets what he did, but he still blames the agency for putting his family's future at risk. He has not really accepted responsibility for this. He has not really accepted responsibility for this. He says the agency has ruined the life of his wife and children. That seems very shortsighted to me. Perhaps he feels that by sneaking into Fort Knox to telephone women with whom he engages sexually explicit e-mail, rather than calling them from the comfort of home, he has acted in accordance with the best intentions for his family. But the truth is, the Army cannot be blamed for any harm that has come to the appellant's family based on his own criminal activity, insubordination, and peculiar, territorial misuse of Government property.

The appellant also says he would never do it again, and he may feel that way today, but he has not shown any inclination to stop calling women from other people's cubicles, even after being caught by his supervisor. There is no independent evidence to support his claim of having stopped. The bulk of his behavior seems, well, compulsive. Mr. Moore caught the appellant in Room 1024, and yet the next day the appellant was in there again, 6 a.m. sharp, making Ms. Kaserman's day. Then, after he was caught by his supervisor, he kept on doing it. The record shows he sent Ms. Kaserman a Government e-mail on July 31, saying, "Patti, it was nice talking to you. Just love to

hear your voice in the morning, real soft and sexy, makes me hard just thinking about it now." I don't know why the appellant wants to stay sexually aroused at work, but he may well be unable to stop doing what he is doing. His wife was hustled in and out of the courtroom for "rebuttal" testimony of extremely limited value. He has not shown evidence from any doctor, counselor, family member, or friend, that is attempting to suppress, rather than encourage, the urge to engage in these activities which he finds so sexually arousing, at least in the Fort Knox context. Although the appellant's form of thrill-seeking may seem mild when compared to more aggressive misbehavior, it is disturbing to me that even after being caught, he has continued calling Ms. Kaserman from work and sending this email. If anything, the appellant is more disgruntled now than he was when the telephone and e-mail misuse began. He also seems more stressed, as anyone would be under these circumstances would be, and more frustrated by lack of control over his employment. I think we all know from experience in these sorts of cases that a man with a propensity to relieve tension with inappropriate sexual activity will be more likely to seek out that activity when stressed and frustrated. The appellant has provided no support for his claim that the activity giving rise to these charges will stop.

The eleventh *Douglas* factor, although no one has mentioned it yet, is interesting to me because I will tell you I think Mr. Moulton did an excellent job presenting this case. He pointed out every flaw in the agency's process, threw up some exciting red herrings, and had us all going for a while. But he never once mentioned a mitigating circumstance. I have scoured the record to look for a mitigating circumstance, to see whether the appellant was having some type of psychiatric problem, some unusual tensions, something that would make a person who was not normally interested in activities leading to the five

charges in this case to undertake them. But I do not see evidence of any mitigating circumstances that would help provide an explanation of the appellant's stealthy, inappropriate, and insubordinate behavior. Oddly enough, we never even received an explanation why the appellant did not pay ten cents a minute to call Ms. Kaserman from a pay phone.

Finally we come to the issue I asked Mr. Moulton about because I think it is something we all have to consider very seriously: the adequacy and effectiveness of alternative sanctions to deter such conduct in the future. This man has 27 years of service. He is a distinguished employee. He has an excellent military career. Nobody wants to see a person like this eating out of a dumpster. But, honestly, I do not see any way that the appellant could be restored to his position.

My options are limited. I could determine that suspension would be sufficient. But how can I put him back to work in his current position? He is a self-confessed disgruntled employee, with no respect for his supervisor. He wrote that Ms. Wolfe was too fat for him to pursue sexual relations with her, and attributed her dissatisfaction with his work to the assertion that "she had not been laid in 14 years." He wrote to Pat Kaserman, "I don't know who's reading all these messages, but if they are reading this one, stick it." Under these circumstances, I really do not think that Ms. Wolfe can be expected to take the appellant back under her wing. Also, there is a strong likelihood that the appellant's misconduct would reoccur. So although there is a case similar to this one in which someone's removal was mitigated to a 75-day suspension,[4] I do not think a long-term suspension

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[4] *See' Steinberg v. Department of Defense,* 52 M.S.P.R. 547 (1992) (removal mitigated to 75-day suspension where unauthorized use of a Government photocopy machine,

would be effective in this case. I am not convinced the appellant can or will stop. I do not think he wants to stop and the fact that he kept going after he was caught indicates to me that he is not a good candidate for stopping. And if caught again by someone less trustworthy than his supervisor, he would be extremely vulnerable to blackmail, which is not the situation in which we prefer to find our people in charge of military communications.

I could also demote the appellant to a lower-graded position, although the nature of his work requires independent functioning. The appellant wrote Ms. Kaserman, he would "pay back" the person who tries to control his e-mail by controlling and monitoring the phones. There is no evidence of a lower-graded position in which the appellant could provide useful service to the agency, while remaining appropriately supervised. We must bear in mind that the appellant assured his correspondents their email could not be discovered by others. The appellant couldn't have forgotten about Oliver North. Telling these women their e-mail would be deleted and could not be used against them was a way to coerce their participation. It seems ill-advised to expect the appellant to turn 180 degrees and maintain the security of communications at Fort Knox.

As I mentioned before, I do not have the authority to move the appellant. When I give you my decision, which is to sustain all of the 'charges and to uphold the removal, I am going to include a settlement paragraph at the end which gives you thirty days to toss it around between yourselves. Maybe the appellant can take a good look in the mirror and see what his strengths and weaknesses are, and throw himself on the mercy of the Army. Maybe the Army can

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unauthorized entry onto a naval base, and failure to comply with orders charges sustained).

find him a job not be quite so sensitive, where he would pose no risk to the national security if caught again and blackmailed for information. But there is simply nothing I can do about that. He is not really eligible for demotion to a lesser position because of the nature of his work and I think he would be a serious security risk, and an unreasonable nuisance to Ms. Wolfe, with a suspension of a long term nature.

So that is my decision. What you will receive is a copy of what I have said in transcript format and attached to it will be all of the same appeal rights you get with a regular decision and a paragraph asking you to consider the possibility of settlement. If you have any questions about the decision, you can call up the office. But the appeal rights should be self-explanatory.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: s/ _____
Nina Puglia
Administrative Judge

5 U.S.C.A. § 1221

Sec. 1221. Individual right of action in certain reprisal cases

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)

(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.

(3)

(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.

(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

(d)

(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

(e)

(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel

practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that -

(A) the official taking the personnel action knew of the disclosure; and
(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(f)

(1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.

(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

(3) If, based on evidence presented to it under this section, the Merit Systems

Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215.

(g)

(1)

(A) If the Board orders corrective action under this section, such corrective action may include -

(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not ccurred; and
(ii) back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.

(B) Corrective action shall include attorney's fees and costs as provided for under paragraphs (2) and (3).

(2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

(3) If an employee, former employee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.

(h)

(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) is alleged.

(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.

5 U.S.C.A. § 2302

Sec. 2302. Prohibited personnel practices

(a)

(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section -

(A) "personnel action" means -

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination; and
(xi) any other significant change in duties, responsibilities, or working conditions; with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action -

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; and
(C) "agency" means an Executive agency and the

Government Printing Office, but does not include -

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8);

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -

(1) discriminate for or against any employee or applicant for employment -

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age

Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of -

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences
>
> > (i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of -

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the

exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)

(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the

merit system principles contained in section 2301 of this title. This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under -

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)

(1) For the purpose of this section, the term "veterans' preference requirement" means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f), 7281(e), and 7802(5) of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations

as being a veterans' preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

5 C.F.R. 1201.56

Sec. 1201.56 Burden and degree of proof; affirmative defenses.

(a) Burden and degree of proof--(1) Agency: Under U.S.C. 7701(c)(1), and subject to the exceptions stated in paragraph (b) of this section, the agency action must be sustained if:

(i) It is brought under 5 U.S.C. 3592(a)(3), 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) Appellant. The appellant has the burden of proof, by a preponderance of the evidence, with respect to:

(i) Issues of jurisdiction;

(ii) The timeliness of the appeal; and

(iii) Affirmative defenses.

In appeals from reconsideration decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence, entitlement to the benefits. An appellant who has received an overpayment from the Civil Service Retirement and Disability Fund has the burden of proving, by substantial evidence, eligibility for waiver or adjustment.

(b) Affirmative defenses of the appellant. Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (a) of this section, if the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at its decision;

(2) Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c) Definitions. The following definitions apply to this part:

(1) Substantial evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(2) Preponderance of the evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(3) Harmful error. Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence

or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.
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